No. 195

Supreme Court of the United States

OCTOBER TERM, 1953

INTERNATIONAL LONGSHOREMENS' AND WAREHOUSEMENS' UNION, LOCAL 37, *et al.*,
Appellants,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service, *Respondent.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR APPELLANTS

A. L. WIRIN,
NORMAN LEONARD,
AND JOHN CAUGHLAN,
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OPINION BELOW

The opinion of the District Court is reported at 111 F. Supp. 802.

JURISDICTION

The opinion of the three-judge District Court was rendered on April 10, 1953 (R. 7-14). Appellants' Motion for Rehearing was filed on April 20, 1953 (R. 14), and was denied on April 21, 1953 (R. 15). The Order Allowing Appeal was filed on June 22, 1953 (R. 17). The jurisdiction of this court to review the cause by appeal rests on 28 U.S.C. §§1253, 2101(b).

QUESTIONS PRESENTED

Whether Congress intended to provide, and may constitutionally so provide, for the exclusion of noncitizens lawfully admitted for permanent residence in the continental United States upon their return from Alaska, after traveling directly to and returning directly from there, in pursuance of their seasonal, contractual employment.

STATUTE INVOLVED

Paragraph (7) of subsection 212(d) of the Immigration and Nationality Act of 1952, 8 U.S.C. §1182(d)(7), 66 Stat. 182, provides:

> "The provisions of subsection (a) of this section, except paragraphs (20), (21), and (26), of said subsection shall be applicable to any alien who shall leave Hawaii, Alaska, Guam, Puerto Rico, or the Virgin Islands of the United States, and who seeks to enter the continental United States or any other place under the jurisdiction of the United States; *Provided,* That persons who were admitted to Hawaii under the last sentence of §8(a)(1) of the Act of March 24, 1934, as amended (48 Stat. 456), and aliens who were admitted to Hawaii as nationals of the United States shall not be excepted by this paragraph from the application of paragraphs (20) and (21) of subsection (a) of this section, unless they belong to a class declared to be nonquota immigrants under the provisions of §1101(a)(27) of this title, other than sub-paragraph (c) thereof, or unless they were admitted to Hawaii with an immigration visa. The Attorney General shall by regulations provide a method and procedure for the temporary admission to the United States of the aliens described in this proviso.

Any alien described in this paragraph, who is excluded from admission to the United States, shall be immediately deported in the manner provided by §1227(a) of this title."

STATEMENT

The individual appellants are non-citizens* who have been lawfully admitted for permanent residence to the continental United States, who are members of the appellant union, a voluntary association which bargains collectively for the jobs and job opportunities in the Alaska herring and salmon canning industries. The union consists of a membership of over 3,000 persons, the majority of whom are non-citizens engaged in seasonal agricultural work in the western states during the fall and winter months, who then travel to Alaska during the summer months to man the herring and salmon canneries (R. 1-2). This employment is a substantial and essential portion of each individual appellant's yearly income (R. 6).

The respondent John P. Boyd, District Director, Immigration and Naturalization Service, for District 11 (including Washington and Alaska) announced that paragraph (7) of subsection 212(d) of the Immigration and Nationality Act of 1952 would subject all non-citi-

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*Doubt remains as to the status of Filipinos, such as appellant Mangaoang, who came to this country for permanent residence as nationals, prior to the effective date of the Philippine Independence Act, 48 Stat. 456, despite the cases of *Cabebe v. Acheson,* (CA 9) 183 F.(2d) 795; and *Mangaoang v. Boyd,* (CA 9) 205 F.(2d) 553. Cf. Brief in Opposition, *Mangaoang v. Boyd,* No. 345, October Term, 1953. The petition for *certiorari* was denied: 346 U.S. ....., 98 L.Ed. 65.

zens who leave the continental United States to work in Alaska to the exclusion provisions of the Act upon their return to Seattle despite the fact that they never leave the territory of the United States (R. 2-3).

The appellants sought an injunction and declaration of rights on the grounds that Congress did not intend such an application of the Act, and, if it did, such an application is unconstitutional.

The case was argued before a three-judge district court on April 6, 1953, and on April 10, 1953, said court filed its opinion holding that Congress intended, and had the constitutional power, to subject persons situated as the individual appellants to the exclusion provisions of the Act. The court's order denying appellants' motion for rehearing was entered on April 22, 1953. The order allowing appeal was entered on June 22, 1953.

SPECIFICATIONS OF ERROR

The District Court erred:

1. In holding that paragraph (7) of §212(d) of the Immigration and Nationality Act of 1952 applies to lawful permanent residents of the continental United States who travel to Alaska from Seattle and who seek to return therefrom to the continental United States at Seattle.

2. In holding that Congress has the power to classify Alaska as a foreign territory for the purpose of exclusion.

3. In holding that aliens who are lawful permanent residents of the United States, and who never leave the

territory of the United States, may be constitutionally excluded pursuant to the provisions of paragraph (7) of §212(d) of the Immigration and Nationality Act of 1952.

4. In denying appellants an injunction restraining the respondent, John P. Boyd, District Director, Immigration and Naturalization Service, from enforcing the provisions of paragraph (7) of §212(d) of the Immigration and Nationality Act of 1952 as applicable to appellants, and those they represent, and the declaration of rights prayed for.

5. In denying appellants' motion for rehearing and reconsideration.

SUMMARY OF ARGUMENT

Although there are individual appellants before the court whose appeals must be heard, the appellant union likewise has standing to be heard since the ultimate effect of the possible exclusion of its membership who are non-citizens presents a serious threat to its ability to meet its contract obligations as a principal bargaining agent for jobs in the Alaska herring and salmon canneries. Moreover, it is the most practical party to fully adjudicate the impact of the provisions of subsection 212(d)(7) upon its membership.

The district court misconstrued congressional intent when it held that subsection 212(d)(7) subjected non-citizens who are lawfully admitted to the continental United States for permanent residence to the exclusion process upon their return from Alaska. The subsection properly and consistently interpreted provides

only for the potential exclusion of non-citizens who seek to enter the continental United States *through* the territories. Since 1913, admittance to the territories is only conditional, not unqualified; *Healy v. Backus* (CA 9) 221 Fed. 358. The instant case, however, involves the status of persons who have been unqualifiedly admitted to the United States, and who have not, since that admittance, left the jurisdiction of the United States.

In any event, if Congress did intend to subject persons admitted unqualifiedly into the United States to the exclusion process, then subsection 212(d)(7) is unconstitutional. Once admitted unqualifiedly, non-citizens enjoy the status of persons entitled to the constitutional guarantees of persons: *Bridges v. Wixon,* 326 U.S. 135. They can travel throughout the United States in pursuance of their right to work, which is a right necessarily included in the right to enter: *Truax v. Raich,* 239 U.S. 33. Upon their return from Alaska to the mainland they cannot, therefore, be considered entrant aliens: see, *Kwong Hai Chew v. Colding,* 344 U.S. 590; *Carmichael v. Delaney* (CA 9) 170 F.(2d) 239; *United States v. Shaughnessy* (S.D. N.Y.) 113 F. Supp. 49.

ARGUMENT

I.

The Parties Before the Court have Standing to Bring the Within Action

In its order placing this appeal on the calendar for hearing, the court stated:

> "The statement of jurisdiction in this case having been submitted and considered by the court, further consideration of the question of the jurisdiction of this court is postponed to the hearing of the case on the merits. The appellants are requested to discuss on brief and oral argument the right of the union to sue for an injunction upon behalf of its members." (R. 20)

Before discussing the standing of the union to bring the within action, it seems appropriate to call attention to the fact that there are four appellants before the court. They are: 1) The International Longshoremens' & Warehousemens' Union, Local 37, a voluntary association; 2) Christ Mensalvas; 3) Ernesto Mangaoang; and 4) Pedro Bonilla (R. 1, 15). Thus, regardless of the standing of the union, this court has before it individual appellants who are entitled to be heard: *Hague v. Committee for Industrial Organization,* 307 U.S. 496; *United Public Workers v. Mitchell,* 330 U.S. 75.

Turning, however, to the standing of the union, it is respectfully submitted that said union does have standing and interest justifying its appeal being heard.

In *Hague v. Committee For Industrial Organization,* (CA 3) 101 F.(2d) 774, it was stated, almost in passing, *supra,* at 790:

> "The appellants contend that because one of the

> appellees is a corporation and others are unincorporated associations they are not entitled to enjoy some of the civil rights which are the subject of the suit. All of the appellees referred to however, are membership corporations or associations and it clearly appears that the suit was brought by them for the benefit of their members. In our opinion these appellees were proper parties and able to conduct the suit in representative capacities on behalf of the interests of their respective members."

The *Hague* case involved a suit for injunction pursuant to section 1 of the Civil Rights Act of 1871, 17 Stat. 13. This court in *Hague v. Committee For Industrial Organization, supra,* affirmed the Court of Appeals on the merits, but dismissed the action except as to the individual respondents. Justices Roberts and Black felt, *supra,* at 514, that:

> "Natural persons, and they alone, are entitled to the privileges and immunities which Section 1 of the Fourteenth Amendment secures for 'citizens of the United States.' Only the individual respondents may, therefore, maintain this suit."

Justices Stone and Reed, agreed in principle, but felt that the status of the individual respondents to sue should not depend upon citizenship. They stated, *supra,* at 527:

> "Since freedom of speech and freedom of assembly are rights secured to persons by the due process clause, all of the individual respondents are plainly authorized by §1 of the Civil Rights Act of 1871 to maintain the present suit in equity *to restrain infringement of their rights.* As to American Civil Liberties Union, which is a corporation, it cannot be said to be deprived of the civil rights

> of freedom of speech and assembly, for the liberty guaranteed by the due process clause is the liberty of natural, not artificial, persons." (Emp. supp.)

Chief Justice Hughes concurred in the views of the opinion of Mr. Justice Roberts, *supra,* at 532.

It is apparent from the above discussion that the rationale of the *Hague* dismissal was that the liberties sought to be protected were such as not to be enjoyed by artificial personalities, and not that voluntary associations, *qua* voluntary associations, lack standing to bring suit.

This conclusion is fortified by the recent case of *Joint Anti-Fascist Refugee Com. v. McGrath,* 341 U.S. 123, where several voluntary asosciations were held to have standing to bring actions for injunctions and declaratory relief. As in the *Hague* case, however, there were multiple, concurring opinions rather than a single majority opinion.

Justices Burton and Douglas felt "the standing of the petitioners to bring the * * * suits * * * clear" (*supra,* 140), stating, *supra,* at 141:

> "We long have granted relief to parties whose legal rights have been violated by unlawful public action, although such action made no direct demands upon them."

Mr. Justice Frankfurter agreed that "it is not always true that only the person immediately affected can challenge the action" (*supra,* 154), pointing out, *supra,* at 159, that:

> "The threat which it [i.e., the subversive designnation] carries for those members who are, or *purpose to become,* federal employees make it not a

> finicky or tenuous claim to object to the interference with their opportunities to retain or *secure* such employees as members. * * * " (Emp. supp.)

Finally, Mr. Justice Jackson, while recognizing that "the real target * * * is the government employee who is a member of, or sympathetic to, one or more accused organization" (*supra,* 184), pointed out, *supra,* at 187:

> "The only practical judicial policy when people pool their capital, their interests, or their activities under a name and form that will identify collective interests, often is to permit the association or corporation in a single case to vindicate the interests of all."

The rule that appears to emerge as the lowest common denominator of the various opinions is "that a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation," *Barrows v. Jackson,* 346 U.S. 249, 255. The crucial inquiry, therefore, is: What effect does the proposed interpretation of paragraph (7) of subsection 212(d) have upon the union, as such?

The union "is a voluntary association of over three thousand persons who work every summer in the herring and salmon canneries of Alaska" (R. 1), and "has been for many years a principal bargaining agent in said industries" (R. 2). "[T]hese collective bargaining agreements govern * * * the terms and conditions of employment and seniority of employment in the various salmon and herring canneries in Alaska" (R. 2).

It is clear, therefore, that the appellant union is one of relatively small membership; which, *every year,* dispatches this membership to the various jobs in the

herring and salmon canneries in Alaska. It is readily evident that if any great number of its members ultimately are either excluded upon return from Alaska in the coming years, or decline to risk Alaskan employment because of the possibility of exclusion or future expulsion, the union's ability to fulfill its contractual obligations will be seriously, if not fatally impaired.* Thus the very existence of the union is potentially involved, an interest which clearly justifies its seeking legal redress from the action of the respondent.

This interest of the appellant union is certainly as great as that of the school allowed to challenge a statute that deprived its *potential* pupils of due process: *Pierce v. Society of Sisters*, 268 U.S. 510; or the alien employee allowed to rely upon the rights of his employer: *Truax v. Raich*, 239 U.S. 33; or the white vendor who claimed that an ordinance deprived *potential* Negro vendees of their constitutional rights: *Buchanan v. Warley*, 245 U.S. 60; see also: *Barrows v. Jackson, supra.*

Moreover, the union is the only practical party to fully test the impact of subsection 212(d)(7) upon its

*Upon return from Alaska in the months of August and September, 1953, at least thirty members of the union were held for possible exclusion, and there are presently pending, twelve exclusion proceedings against union members. It is obviously impossible at this time, to estimate the effect these proceedings will have upon the decision of the remaining membership to travel to Alaska in the summer of 1954, but it does represent a more serious problem to the union *now*, than prior to the 1953 season.

non-citizen membership. The individual members are faced with this dilemma: If they decide to travel to Alaska, they thereby risk their ultimate exclusion or expulsion upon their return to the mainland after any future canning season; if, on the other hand, they decide such a risk is too great, they must forego their jobs in Alaska, although such "employment * * * constitutes the source of a substantial portion of their yearly income" (R. 6), and their "contract and property rights will be * * * forfeited" (R. 2).

But, even if the individual members elect to run the risk of Alaskan employment, and successfully gain readmittance to the continental United States upon their return, they will nevertheless suffer a substantial loss of status. This result follows since the readmittance to the mainland will, if the district court's decision is upheld, constitute a new "entry." Conduct in the future may, therefore, subject them to *expulsion* because of the temporal proximity of the later re-entry: see *e.g., Delgadillo v. Carmichael,* 332 U.S. 338; *United States ex rel. Volpe v. Smith,* 289 U.S. 422; *DiPasquale v. Karnuth* (CA 2) 158 F.(2d) 878; *Taguchi v. Carr* (CA 9) 62 F.(2d) 307.

This change of status will embrace all the non-citizen members of the union who travel to Alaska; but the full impact of the change will not be determined judicially except by a plethora of individual habeas corpus actions in the extended future. It is submitted, therefore, that this case is one where, in the words of Mr. Justice Jackson, quoted *supra,* "The only practical

judicial policy * * * is to permit the association * * * in a single case to vindicate the interests of all." The union's suit can best settle the issue of the power of respondent to subject its members to the exclusion process immediately, or to the expulsion process in the future, as the consequence of travel to Alaska.

Finally, two brief points should be mentioned regarding the standing of the union. First, section 301(b) of the Labor-Management Act of 1947, 61 Stat. 156, provides that appellant union "may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States." See also: Rule 17(b), Federal Rules of Civil Procedure. Second, since respondent did not object to the capacity of the appellant union to sue in the District Court, the objection is waived: see, *International News Service v. Associated Press,* 248 U.S. 215; *McCandless v. Furland,* 293 U.S. 67; Rule 12(h), Federal Rules of Civil Procedure.

The appellant union is clearly entitled to an injunction and declaration of the statutory and constitutional rights claimed by the within action.*

For the above reasons, it is respectfully submitted that the union does have standing justifying its appeal being heard with the appeals of the individual appellants herein.

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*It should be noted that the union's interests can only be represented in an affirmative action such as this, since the collateral remedy of habeas corpus is wholly inapplicable.

II.

Congress Did Not Intend to Provide for the Exclusion of Persons Lawfully Admitted for Permanent Residence in the Continental United States Upon Their Return from Alaska After Travel Directly to and from Alaska by United States Transport Facilities in Pursuance of Their Seasonal, Contractual Employment.

The pertinent portion of paragraph (7) of subsection 212(d) of the Immigration and Nationality Act of 1952, 66 Stat. 182, provides:

> "The provisions of subsection (a) of this section * * * shall be applicable to any alien who shall leave Hawaii, Alaska, Guam, Puerto Rico, or the Virgin Islands of the United States, and who seeks to enter the continental United States or any other place under the jurisdiction of the United States. * * * "

Subsection 212(a), 66 Stat. 182, enumerates the excludable classes of aliens, and is introduced by the language:

> "Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States."

The visas referred to are either immigrant or nonimmigrant visas; see sections 203-211 of the Act, 66 Stat. 175-181.

Subsection 101(a)(15), 66 Stat. 166, defines immigrant alien as "every alien except an alien who is within one of the following classes of nonimmigrant aliens." House Report, No. 1365, February 14, 1952, at pages 36-37, explains the basic distinction between immigrants and nonimmigrants:

> "Aliens who meet the qualitative tests and are eligible for admission into the United States are classified under existing law as either immigrants or nonimmigrants. *The immigrant class includes those aliens who seek to enter the United States for permanent residence,* while the nonimmigrant class includes those aliens who seek to enter for temporary periods of stay." (Emp. supp.)

This definition is in full accord with the proposition that immigration concerns immigrants and not permanent residents; see, *Lapina v. Williams,* 232 U.S. 78. The power to exclude does not extend to persons lawfully resident in the United States for when "There being in legal contemplation no entry, there * * * [can] be no exclusion," *Carmichael v. Delaney* (C.A. 9) 170 F.(2d) 239, 243.

Subsection 101(a)(13), 66 Stat. 166, defines entry as:

> " * * * any coming of an alien into the United States, from a foreign port or place or from an outlying possession * * * "

The provisions of subsection 212(d)(7), it is noted, only apply to an alien who "seeks to enter the continental United States."

A cursory reading of paragraph (7) of subsection 212(d) might lead to the conclusion that Congress intended to treat any coming of an alien from the territories as an entry into the United States for the purposes of exclusion. If such an interpretation is adopted, however, it immediately raises the problem of an apparent inconsistency in the use and meaning of the term "entry," since an entry is defined as the "coming of an alien * * * from a foreign port or place or from an

outlying possession." whereas Alaska and the other territories are not foreign ports or outlying possessions.* Indeed, Alaska, and the other territories enumerated in subsection 212(d)(7), are defined as part of the United States, in the geographical sense, in subsection 101(a)(38), 66 Stat. 166.

Assuming, however, that there is no inconsistency between subsection 212(d)(7) and the definition of the term "entry," which is the proper assumption: see, *Helvering v. Credit Alliance Corp.,* 316 U.S. 107; *United States v. Raynor,* 302 U.S. 540, the import of subsection 212(d)(7) should be to provide for the exclusion of aliens resident in the territories who seek to acquire permanent residence in the continental United States; that is, the provision only applies to aliens who attempt to come to the continental United States "from a foreign port or place or from an outlying possession" *via one of the territories.*

An examination of the legislative history of the paragraph confirms this latter interpretation. The original version, S. No. 2550, p. 66 and H.R. No. 5678, p. 36, provided as relevant:

> "The provisions of subsection (a) of this section * * * shall be applicable to any alien who shall leave *the Canal Zone,* Hawaii, Alaska, Guam, Puerto Rico, or the Virgin Islands of the United States, *or any outlying territory or possession of the United States,* and who seeks to enter the continental United States or any other place under the

*The outlying possessions are defined in subsections 101(a)(29), 66 Stat. 166, as "American Samoa and Swains Island."

jurisdiction of the United States. * * * " (Emp. supp.)

The italicized portion is that which was deleted by Congress before final passage. The reason for the deletion seems obvious, since, to retain that language would render the subsection redundant in view of the definition of "entry," which itself subjects travel from the deleted areas to the exclusive provisions of the Act;* that is, there would be a direct entry into the continental United States from those areas, rather than an entry *through* a territory of the United States. The fact that the Canal Zone and the outlying possessions appear in the original bills apparently was the result of the ancestry of the provision. Former 8 U.S.C. §173, 39 Stat. 874, passed in 1917, is specified by the House Report, *supra,* at pages 144-145, as the immediate predecessor to subsection 212(d)(7). It provided:

> "The term 'United States' shall be construed to mean the United States, and any waters, territory, or other place subject to the jurisdiction thereof, except the Isthmian Canal Zone; but if any alien shall leave the Canal Zone or any insular possession of the United States and attempt to enter any other place under the jurisdiction of the United States, nothing contained in this chapter shall be construed as permitting him to enter under any other conditions than those applicable to all aliens."

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*Entry is the "coming of an alien *into the United States.*" The definition of "United States" does not include either the Canal Zone or the outlying possessions, but does include the territories enumerated in subsection 212(d)(7); see, subsection 101(a)(38); 66 Stat. 166.

This legislative genesis is more important, however, for the fact that (as stated in the House Report, *supra,* at page 53, and Senate Report, No. 1137, January 29, 1952, at page 14):

> "Section 212(d)(7) of the bill continues in effect the special procedures applicable to aliens who travel from the Panama Canal Zone, Territories, or outlying possessions to the continental United States or any other territory under the jurisdiction of the United States. Under the bill such procedures will also be applicable to aliens traveling from Alaska to the continental United States. * * * "

It should be noted that the reports state that the paragraph applies to aliens who *travel from,* rather than *return from,* the territories to the continental United States.

The former law, it is seen, drew the distinction between the continental United States and the *insular* territories. The latter category included Hawaii: see, former 8 U.S.C. §297, 32 Stat. 177, but not Alaska: see, former 8 U.S.C. §295, 32 Stat. 176, 33 Stat. 428, which was considered part of the mainland. Under the present law, however, Congress recognizes three categories of American territory: the continental United States, the territories (including Alaska), and the outlying possessions (which for purposes of entry are treated as foreign ports). This fact explains why the reports state that only travel from Alaska is modified by subsection 212(d)(7).

A deeper examination of the historical roots of subsection 212(d)(7), moreover, discloses that the ration-

ale behind the exclusion of aliens coming to the continental United States from the insular territories has been the theory that the original entry into the territories is only *conditional,* and not one permitting, automatically, an unqualified entry into the continental United States.

The cases of *In re Singh* (N.D. Cal.) 209 Fed. 700, and *Healy v. Backus* (C.A. 9) 221 Fed. 358, involved the validity of amended paragraph (3) of Rule 14, of the 1913 regulations of the Commissioner General of Immigration, which provided (as quoted in the *Healy* case, *supra,* at 362):

> "That aliens applying at continental ports and surrendering the certificate above described shall, upon identification, be permitted to land, provided it appears that at the time such aliens were admitted to the Philippines they were not members of the excluded classes or likely to become public charges if they proceeded to the mainland."

In discussing this rule, the Court of Appeals pointed out in the *Healy* case, *supra,* at 362-363:

> " * * * The amended rule discards the idea that aliens once admitted to insular possessions are entitled as of course to admission to the continent without further examination, and has injected the thought that aliens might be likely to become a public charge on the mainland when such likelihood would not exist as to them in the insular possessions, and hence they are subject to further examination upon their entry at continental ports."

Regarding the basis for the new rule, the District Court in the *Singh* case stated, *supra,* at 703-704:

> "There may be reasons for rejecting an alien at

> continental ports which would not exist if he were applying to enter the Philippines. * * * A more rigid test may therefore well be applied to those seeking admission to the mainland than that applied to those seeking admission to the Philippines."

The Court of Appeals in the *Healy* case, *supra,* at 363, agreed:

> " * * * Why is it not a reasonable and perfectly natural * * * [practice] to admit such persons to the insular possessions *on condition* that if they proceed to the mainland they must submit to further examination as to their likelihood of becoming public charges in the latter country? It is but the application and enforcement of the act according to the conditions found to exist, and is not, we think, beyond the authority conferred by Congress. *The admission to the insular possessions* under the amended Rule 14 *is not an admission generally, but only qualifiedly and conditionally, so that applicant's exclusion from the continent may yet proceed upon the ground that he is one of the excluded classes, and not upon the ground of having, after entry, become a public charge for causes theretofore existing after unqualified admission."* (Emp. supp.)

Thus, the exclusion of aliens who seek to enter the continental United States for permanent residence from the insular territories was upheld precisely because the original entry into the insular territories was not an unqualified admission into the United States generally. See also: *Matsuda v. Burnett* (C.A. 9) 69 F.(2d) 272; *Sugimoto v. Nagle* (C.A. 9) 38 F.(2d) 207.

This conditional entry theory is not only totally con-

sistent with the proposed interpretation of the instant provision, but, from an examination of the congressional debates, it becomes clear that it was the theory which guided Congress in its passage of subsection 212(d)(7).

On April 14, 1952, reported in 98 Cong. R. No. 69,* the proposed act was opened for amendment in the House of Representatives. Mr. Farrington, delegate from Hawaii, introduced the following addition to the proposed definition of the phrase "lawfully admitted for permanent residence" in paragraph (20) of subsection 101(a):

> "Persons who were admitted to Hawaii under the last sentence of section 8(a)(1) of the Act of March 24, 1934, as amended (48 Stat. 456), shall be deemed to have been lawfully admitted for permanent residence." (page 4468)

The act referred to is the Philippine Independence Act which subjected Filipinos who came to the mainland after 1934 to the immigration laws. As nationals they could before then come to the continental United States without restriction: see, *Toyota v. United States,* 268 U. S. 402; *Gonzales v. Williams,* 192 U.S. 1; *Mangaoang v. Boyd* (C.A. 9) 205 F.(2d) 553. The "last sentence" referred to exempted from immigration restrictions those Filipinos who only sought entry into Hawaii. Thus the proposed addition would have made those Filipinos who came to Hawaii unrestricted by the immigration laws, permanent residents of the United States.

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*Page references hereafter are to this issue of the Congressional Record.

Mr. Walter, the co-author of the act, concluded his argument against the addition as follows:

> " * * * to adopt the amendment, by so doing, you are saying, 'You can come to the mainland,' and I do not think we ought to do that." (page 4469)

This comment is vitally significant, for it is a clear expresson of Mr. Walter's opinion that if an alien is *a permanent resident* of the United States, *residing in Hawaii* he *cannot be prevented from traveling to the continental United States.*

The amendment was rejected, but later on the same day Mr. Farrington, as a companion proposal, introduced the following substitution for the pertinent provisions of subsection 212(d)(7):

> "The provisions of subsection (a) * * * shall be applicable to any alien who shall leave the Canal Zone, Guam, Puerto Rico, or the Virgin Islands of the United States or any outlying territory or possession of the United States, other than Hawaii or Alaska, and who seeks to enter the continental United States. * * * " (page 4471)

The debate on the proposed amendment again confirms the suggested interpretation. Mr. Farrington stated in support of the amendment:

> "The purpose of this amendment is to give aliens who now enjoy the status of permanent residents of the Territory of Hawaii the status of permanent residents of the United States.
>
> "The practical result of the adoption of this amendment would be to provide for aliens in Hawaii who are permanent residents the same privilege of travel to the States and among the States

that is permitted to aliens who are permanent residents of the States." (page 4472)

"It seems to us in Hawaii that both the interests of ourselves as well as that of the States would have been better served if these people could have moved freely to California just like they move from California to Nevada or Oregon between the States." (page 4472)

Mr. Walter in reply to this argument did not challenge the underlying thesis that permanent residents of the United States are unaffected by the section. He stated, in part:

" * * * It is important to bear in mind the fact that there are a great many aliens in Hawaii who have never been properly screened. There they are, and if this amendment is adopted they would come to the United States without any further screening and could remain here. * * * It is entirely a question of aliens coming to the United States, and I for one do not think they should be admitted whether they come from Hawaii or whether they come from Europe, without being screened in order to determine whether or not they are subversive."* (page 4473.)

"The only thing under this law that is required of them is an additional screening when they arrive at the Pacific coast in order to determine whether or not they are admissible under the general immigration laws of the United States; that is all." (page 4473.)

*These comments are consistent with the proviso in subsection 212(d)(7) which withholds from Filipinos who entered Hawaii unrestricted by the immigration laws the exemption from the visa-exclusion provisions of paragraphs (20) and (21) of subsection 212(a).

The tenor of Mr. Walter's argument is markedly reminiscent of the discussion in *Healy v. Backus, supra.*

To recapitulate the history of restrictions upon entry from the territories: In 1913, by regulation, the practice of admitting aliens into the continental United State automatically upon proof of lawful admittance into the insular territories was abandoned for the practice of making the original entry into the territory conditional only, subjecting the alien who seeks entry into the continental United States to further exclusion proceedings. This procedure was upheld, in 1915, upon the conditional entry theory, in *Healy v. Backus, supra.*

In 1917, Congress legislated generally on the subject, but did not restrict travel of aliens from Alaska, which at that time was treated as part of the continental United States.

In 1952, Congress provided that admittance to Alaska should likewise be conditional, no longer entitling aliens with such residence to admittance to the continental United States as a matter of right.

The individual appellants herein, however, (as well as those they and the union represent) are non-citizens who have already been *unqualifiedly* admitted to the United States for permanent residence; they are not, therefore, immigrants seeking to come to the mainland.

The mere fact that their employment requires them to travel to the territory of Alaska does not alter the nature of their original entry, or their status as residents of the United States: see, *Kwong Hai Chew v. Colding,* 344 U.S. 590; *Carmichael v. Delaney, supra.* In *United States v. Shaughnessy* (S.D. N.Y.) 113 F.

Supp. 49, after the mandate of this court in the *Chew* case had been returned, Chew brought a supplemental writ of habeas corpus to test the validity of the District Director's denial of bond pending his hearing. The District Court ordered Chew released, stating in part, *supra,* at 53:

> "[The] * * * underlying rationale appears to be that the circumstance of his employment as a seaman on a ship of American registry did not break the continuity of his permanent residence so as to deprive him of those rights which clearly he enjoyed as an alien resident on terra firma."

It should be noted that the departure from the continental United States in the *Chew* and *Carmichael* cases involved travel to foreign ports and territory. Here, however, *the travel* involved *is within the United States after unqualified admission into the United States.* In the words of Representative Walter, as permanent residents of the United States "[they] can come to the mainland."

Thus, the District Court erred when it concluded that the exclusion provisions of subsection 212(a) apply to appellants because "The words 'any alien' include aliens situated as are those here involved," *International Longshoremen's and W. Union v. Boyd* (W.D. Wash.) 111 F. Supp. 802, 806. Such a conclusion fails to appreciate that the words "any alien" are modified by the phrase "who seeks to enter the continental United States." The aliens involved herein, however, are not seeking to enter the United States; they are already lawfully admitted for permanent residence.

The District Court, therefore, should be reversed,

having erroneously interpreted congressional intent to the detriment of appellants' rights to travel to, work in, and return from Alaska.

III.

Congress Does Not Have the Constitutional Power to Provide for the Exclusion of Aliens Who Are Lawfully Admitted to the Continental United States When They Seek to Return After Travel Directly to and from Alaska in Pursuance of Their Seasonal Employment in Alaska.

The Court below concluded as regards the constitutional issues presented, in *International Longshoremen's & W. Union v. Boyd,* 111 F. Supp 802, at 807:

> " * * * Keeping clearly in mind the vast and broad powers of Congress to enact legislation excluding or expelling aliens as balanced against the limited constitutional rights of all aliens, including lawfully admitted resident aliens of continental United States, we cannot hold that that portion of the statute under attack offends or is beyond the constitutional authority vested in Congress even though its provisions make applicable restrictions upon aliens leaving the territories of the United States, including Alaska, and entering or re-entering other territories, states or places under United States jurisdiction when not applicable to aliens permanently resident in or traveling within or between the states. Neither are we aware of any constitutional limitation upon the power of Congress which would forbid its classification in the same category, for the purpose of exclusion, lawfully admitted aliens permanently residing in continental United States when seeking re-entry into the states from a territory of the United States,

and similarly situated aliens seeking re-entry to the United States from a foreign land."

The first relevant inquiry, therefore, is: What is the nature and source of the exclusion power? In the early *Head Money Cases,* 112 U.S. 580, the power of Congress to impose a head tax upon the ship companies for every alien brought into the United States was challenged; this court, identifying the power employed, stated, *supra,* at 595:

> " * * * the power exercised in this instance is not the taxing power. The burden imposed on the ship owner by this statute is the mere incident of the regulation of commerce, of that branch of foreign commerce which is involved in immigation."

Having established the constitutional source of the power to regulate immigration, the opinion concluded, *supra,* at 600:

> " * * * Congress having the power to pass a law regulating immigration as a part of the commerce of this country with foreign Nations, *we see nothing in the statute by which it has here exercised that power forbidden by any other part of the Constitution."* (Emp. supp.)

In *Chae Chan Ping v. United States* (The Chinese Exclusion Case) 130 U.S. 581, the next important case to discuss the exclusion power, this court stated, *supra,* at 604:

> " * * * The powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the States, and admit subjects of other nations to citizenship, are all sovereign powers, *restricted* in their exercise *only by the Constitution itself and*

consideration of public policy and justice which control, more or less, the conduct of all civilized nations." (Emp. supp.)

The italicized portions from the opinions in the *Head Money* and *Chinese Exclusion* cases, demonstrate that, from the earliest judicial considerations of the exclusion power, it has never been argued or assumed that the power was unrestricted. *The power to exclude is a sovereign power, but* one arising from the power delegated to Congress to regulate foreign commerce, and which *is limited by the Constitution.*

In the leading case of *Ekiu v. United States,* 142 U.S. 651, these concepts were restated, *supra,* at 659, as follows:

> "It is an accepted maxim of international law, that every sovereign nation has power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. * * * In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress, upon whom *the Constitution has conferred power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods and the bringing of persons into the ports of the United States;* to establish a uniform rule of naturalization; to declare war, and to provide and maintain armies and navies; and to

make all laws which may be necessary and proper for carrying into effect these powers and all other powers vested by the Constitution in the government of the United States or in any department or officer thereof. U.S. Const. art. 1, §8; *Head Money Cases,* 112 U.S. 580; *Chae Chan Ping v. United States,* 130 U.S. 581, 604-609." (Emp. supp.)

Thereafter, *supra,* at page 660, the opinion amplified the limitations upon the exclusion power:

"* * * It is not within the province of the judiciary to order that *foreigners who have never* been naturalized, nor *acquired any domicil or residence within the United States, nor even been admitted into the country, pursuant to law,* shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. *As to such persons, decisions of executive or administrative officers acting with powers expressly conferred by Congress, are due process of law."* (Emp. supp.)

These concepts were recently reaffirmed in *United States ex rel. Knauff v. Shaughnessy,* 338 U.S. 537, at 543:

"Thus the decision to admit or to exclude an alien may be lawfully placed with the President, who may in turn delegate the carrying out of this function to a responsible executive officer of the sovereign, such as the Attorney General. The action of the executive officer under such authority is final and conclusive. *Whatever the rule may be concerning deportation of persons who have gained entry into the United States,* it is not within the province of any court, unless expressly authorized by law, to review the determination of the political

branch of the government to exclude a given alien." (Emp. supp.)

When Congress exercises the commerce power in fields other than immigration, it is clear that "resort to the Commerce Clause can [not] defy the standards of due process." *Secretary of Agri. v. Central Roig. Ref. Co.,* 338 U.S. 606, 616.

Moreover, and more important to the issues involved herein, the status of imports (immune from state taxation) survives only "until they are sold, removed from the original package, or put to the use for which they are imported." *Hooven & Allison Co. v. Evatt,* 324 U.S. 652, 657. In other words, once goods are merged with the general mass of goods within the United States they lose their status as imports. Similarly, once aliens have lawfully acquired permanent residence, they cease, in the constitutional sense, to be immigrants. They may be deported pursuant to law, but they have become "invested with rights guaranteed by the Constitution to all peoples within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment," *Bridges v. Wixon,* 326 U.S. 135, Justice Murphy concurring at 161, and quoted with approval in *Kwong Hai Chew v. Colding,* 344 U.S. 590, 596-597 (footnote 5). Their "status as * * * person[s] within the meaning and protection of the Fifth Amendment cannot be capriciously taken from [them]," *Kwong Hai Chew v. Colding, supra,* at 601.

Once an alien is "admitted to the United States under the Federal law * * * [he is] admitted with the

privilege of entering and abiding in the United States, and hence of entering and abiding in any state in the Union." *Truax v. Raich,* 239 U.S. 33, 39.

Paragraph (38) of subsection 101(a), 66 Stat. 166, defines United States as:

> " * * * except as otherwise specifically herein provided, when used in a geographical sense * * * the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States."

Paragraph (36) of subsection 101(a), 66 Stat. 166, provides:

> "The term 'State' includes (except as used in section 310(a) of title III [not involved herein]) Alaska, Hawaii, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands of the United States."

Thus, while it is true, as is stated in *Hooven & Allison Co. v. Evatt, supra,* at 671-672:

> "The term 'United States' may be used in any one of several senses. It may be merely the name of a sovereign occuping the position analogous to that of other sovereigns in the family of nations. It may designate the territory over which the sovereignty of the United States extends, or it may be the collective name of the states which are united by and under the Constitution."

it is clear that when dealing with the status of aliens lawfully admitted for permanent residence, the term "United States" is used in the sense of "the territory over which the sovereignty of the United States ex-

tends."* See: *Toyota v. United States,* 268 U.S. 402; *Gonzales v. Williams,* 192 U.S. 1.

Although Congress can regulate the territories free of the constitutional restrictions regarding legislation for the states: see, *e.g., Downes v. Bidwell,* 182 U.S. 244; *Hawaii v. Mankichi,* 190 U.S. 197; *Balzac v. Puerto Rico,* 258 U.S. 298; when it deals with the status of resident aliens, it is subject to constitutional restrictions. The instant provision, as interpreted, is a *restriction on the status and rights of persons to travel, work and remain within the territorial limits of the United States;* it is not merely the regulation of the territories.

The individual appellants (and the membership of the appellant Union), enjoy employment rights pursuant to lawful collective bargaining contracts in the territory of Alaska, "which constitute * * * the source of a substantial portion of their yearly income" (R. 6). Providing for the potential exclusion of aliens who cannot otherwise be expelled, as in the case of Filipinos like appellant Mangaoang [see, *Mangaoang v. Boyd, supra,* No. 345, October Term, 1953],** if they travel

*This meaning is also indicated by subsection 212(d)(7) itself, since its provisions cover travel from the territories to "the continental United States *or any other place under the jurisdiction of the United States.*"

**There are more situations where a non-citizen may not be expellable, but nevertheless excludable, than the cases of Filipinos who came to the United States prior to the effective date of the Philippine Independence Act. For example: aliens who have been convicted of a single crime involving moral turpitude prior to entry are excludable [Section 212(a)(9), 66 Stat. 182],

to Alaska, is tantamount to providing for the forfeiture of their job rights heretofore enjoyed there. To deny such job opportunities is "tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases *they cannot live where they cannot work.*" *Truax v. Raich, supra,* at 42. (Emp. supp.)

In *Kwong Hai Chew v. Colding, supra,* at 592, the facts relevant to residence and employment were:

> " * * * the resident alien is a seaman, he currently maintains his residence in the United States and usually is physically present there, however, he is returning from a voyage as a seaman on a vessel of American registry with its home port in the United States, that voyage has included scheduled calls at foreign ports in the Far East. * * * "

This Court thereafter stated, *supra,* at 600:

> " * * * the constitutional status which petitioner indisputably enjoyed prior to his voyage * * * [was not] terminated by that voyage. From a constitutional point of view, he is entitled to due process without regard to whether or not, for immigration purposes, he is to be treated as an entrant alien, and we do not now reach the question whether he is to be so treated."

but also commented, *supra,* at 598-599:

> " * * * we interpret this regulation as making no

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whereas, to be expellable, the crime must have been committed within five years of the last entry [Section 241(a)(4), 66 Stat. 204]. Moreover, even if the noncitizen gains admittance upon return from Alaska, if the return is treated as a new *entry,* new possibilities for expulsion may arise because of the temporal proximity of the later "entry" to acts which may be committed in the future. Thus, there would be a substantial change of status, in any event.

> attempt to question a resident alien's constitutional right to due process. Section 175.57(b) uses the term 'excludable' in designating the aliens to which it applies. That term relates naturally to *entrant* aliens and to those assimilated to their status. The regulation nowhere refers to the *expulsion* of aliens, which is the term that would apply naturally to aliens who are *lawful permanent residents physically present within the United States.*"* (Emp. supp.)

Paragraph (7) of subsection 212(d), as interpreted, provides, in any event, that resident aliens whose employment requires that they travel to Alaska (as distinguished from foreign ports) be "treated as * * * entrant alien[s]" upon their return, despite the fact that they have never left the territory of the United States. We are thus confronted with a far more compelling example of the issue left in doubt in the *Chew* case.

If the status of permanent resident alien, which "cannot be capriciously taken," and which, if taken, deprives one "of all that makes life worth living," has any substantial significance, *it must survive travel within the United States in pursuance of one's employment,* a right which is necessarily included in the right to enter the United States: *Truax v. Raich, supra.*

The power to exclude, it has been seen, is derived from the power to regulate foreign commerce: *Head Money Cases, supra; Ekiu v. United States, supra.* Thus the requirement of any entry into the United

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*It is appropriate to note that the District Court neither discussed nor cited the *Chew* case.

States as the precondition to exclusion: *Carmichael v. Delaney* (CA 9) 170 F.(2d) 239, is not merely a statutory precondition, but is, in fact, *the constitutional precondition* to exclusion. Thus, the essential question is: Does an alien enter, in the constitutional sense, upon his return from Alaska to his permanent residence on the mainland, when he has never left the territory of the United States?

We are not, it must be restressed, dealing with the rights of "foreigners who have never * * * acquired any domicile or residence within the United States," *Ekiu v. United States, supra.* Nor are we dealing with inanimate goods, which may constitutionally be considered imports although their origin of transit is the territories and not foreign ports: see, *Hooven & Allison Co. v. Evatt, supra.* We are concerned with the status of persons lawfully admitted to the United States for permanent residence who have never left "the territory over which the sovereignty of the United States extends."

When the power to exclude was challenged in *Healy v. Backus* (CA 9) 221 Fed. 358, the alien having acquired lawful residence in the territories, the exclusion was upheld because the alien had only made conditional entry, and thus did not have to be expelled. The court stated, *supra,* at 363:

> "* * * The admission is not an admission generally, but only qualifiedly and conditionally, so that applicant's exclusion from the continent may yet proceed upon the ground that he is one of the excluded classes and not upon the ground of having,

> after entry, become a public charge for causes theretofore existing after unqualified admission."

The necessary and assumed converse of this rule is obvious: once an alien has obtained unqualified admission into the United States generally he may travel throughout the territory of the United States without fear of being excluded.

This court was doubtful that there was an entry, in the constitutional sense, in the *Chew* case, where the alien's claim to continuous residence within the United States was only service on a vessel of American registry. If doubts exist under those circumstances, surely no doubt can exist where there is actual, continuous physical residence within the United States. To hold otherwise is capriciously to deprive the resident alien of his right to remain, travel and work within the United States; for, in actuality he would be *expelled* by the facile, semantic technique of labeling the expulsion an exclusion.

It is therefore submitted that the District Court erred in its conclusion that subsection 212(d)(7) of the Immigration and Nationality Act of 1952, as interpreted and applied to appellants, does not transgress the constitutional powers of Congress to regulate foreign commerce.

CONCLUSION

For the reasons above stated it is respectfully submitted that the judgment of the court below should be reversed, and the injunction and declaration of rights prayed for issue.

Respectfully submitted,

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